

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Local)
Competition Provisions in the)
Telecommunications Act of 199)
)

CC Docket No. 96-98

DOCKET FILE COPY ORIGINAL

To the Commission:

REPLY COMMENTS OF
MICHIGAN, ILLINOIS AND TEXAS COMMUNITIES CONSISTING OF:

Michigan: City of Detroit, City of Grand Rapids, Ada Township, Alpine Township, Baldwin Township, City of Battle Creek, City of Birmingham, Caledonia Township, Village of Chelsea, City of Coldwater, Coldwater Township, City of East Tawas, City of Escanaba, City of Ferndale, Georgetown Charter Township, Harrison Township, Holland Charter Township, City of Ishpeming, City of Kentwood, City of Livonia, City of Marquette, City of Plainwell, Richmond Township, Robinson Township, City of Saline, City of Southfield, City of Wyoming, Zeeland Charter Township

Illinois: City of Chicago Heights, Village of Mount Prospect, Village of Skokie, Illinois Chapter of NATOA

Texas: City of Fort Worth, City of Arlington, City of Coppell, City of Flower Mound, City of Frisco, City of Grand Prairie, City of Hurst, City of Kennedale, City of Longview, City of Louisville, City of Plano, City of University Park

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SUMMARY

The Commission lacks jurisdiction under Section 253 over local governments on compensation or right of way matters. For this reason, the Commission must reject the requests by a few cable interests to have this Commission adopt, as part of this proceeding, rules or guidance affecting municipalities' control of public rights of way or the fees charged telecommunications providers.

Contrary to the statements of some cable television interests, cable companies do not provide service throughout the entire area where they are franchised to provide such service. This is in contrast to telephone companies.

This Commission must consider any preemption matters under Section 253(d) on a case by case basis. It cannot promulgate general rules circumscribing local government action under Section 253.

The sole example (Troy, Michigan) described by the cable interests of alleged improper local government is factually inaccurate in major respects. It is also unpersuasive given that there are 38,000 local units of government in the United States. The Commission can take no action based upon this or other similar examples and must act on a case by case basis.

This Commission must reject cable interests' attempts to get it to rule that municipalities may not require a franchise or other requirement from a cable operator if that operator provides telephone service. Section 621 of the Cable Act does not so provide (and, in fact, states to the contrary). And for the procedural reasons this issue cannot be addressed by the Commission in this proceeding.

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To the Commission:

REPLY COMMENTS OF
MICHIGAN, ILLINOIS AND TEXAS COMMUNITIES:

I. INTRODUCTION:

A. MIT Communities and Their Interest In This Matter:

Michigan, Illinois and Texas communities ("MIT Communities") submit these Reply Comments on behalf of the 43 communities and their approximately two million residents from three states as follows:

From Michigan, 28 communities;¹ from Illinois, 3 communities² plus the Illinois Chapter of the National Association of Telecommunications Officers and Advisors (NATOA); and from Texas, 12 communities.³ Each of these municipalities is the franchising authority for its community.

¹City of Detroit, City of Grand Rapids, Ada Township, Alpine Township, Baldwin Township, City of Battle Creek, City of Birmingham, Caledonia Township, Village of Chelsea, City of Coldwater, Coldwater Township, City of East Tawas, City of Escanaba, City of Ferndale, Georgetown Charter Township, Harrison Township, Holland Charter Township, City of Ishpeming, City of Kentwood, City of Livonia, City of Marquette, City of Plainwell, Richmond Township, Robinson Township, City of Saline, City of Southfield, City of Wyoming, Zeeland Charter Township.

²Illinois Chapter of NATOA, City of Chicago Heights, Village of Mount Prospect, Village of Skokie.

³City of Fort Worth, City of Arlington, City of Coppell, City of Flower Mound, City of Frisco, City of Grand Prairie, City of Hurst, City of Kennedale, City of Longview, City of Louisville, City of Plano, City of University Park.

Each municipality controls the public streets, highways and rights of way in its area to protect the public health, safety and welfare and regulate their use in the public interest. Such public interest includes obtaining fair and reasonable compensation from private parties for the use of these public properties which have been acquired and maintained at great expense.

The Illinois Chapter of NATOA informs and participates in legislative, judicial, regulatory and technical developments that impact local governments on cable and telecommunications matters. Its membership includes municipal officials actively involved in and responsible for cable and telecommunications matters throughout the state of Illinois.

II. REPLY COMMENTS:

A. **No Jurisdiction Over Rights of Way or Fees:** A few cable interests ask this Commission to adopt as part of this proceeding rules or guidance affecting municipalities' control of the public rights of way or the fees charged telecommunications providers. See Comments of TCI at 16-17 and 20-22; Comments of Comcast Corporation at 13 and 15; Comments of Cox Communications at 56-59.

There is a short answer to these comments: The Commission lacks jurisdiction over local governments on compensation or right of way matters. The cable interests are simply trying to relitigate before this Commission an issue on which they were soundly defeated in the halls of Congress. The Commission should -- and must -- decline this improper request by a few cable interests.

In particular, Section 253 of the Telecommunications Act of 1996 regarding barriers to entry, only gives the Commission preemption authority over matters that violate subsections (a) and (b) of that Section. Section 253, Telecommunications Act of 1996, Pub. No. 104-104, 110 Stat. 56

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(February 8, 1996). Congress specifically declined to give the Commission any jurisdiction over any matters contained in subsection (c) which, in general, states that nothing in Section 253 affects the authority of local governments to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers. Id.

Thus, matters pertaining to management of the rights of way and compensation are simply not within the purview or jurisdiction of this Commission and it may issue no rules or guidance of any kind on such matters.

Although the preceding statutory sections could not be more clear, MIT Communities note that the provisions of Section 253 eliminating Commission jurisdiction over rights of way and compensation matters was specifically adopted by Congress to prevent municipalities from having to litigate these matters before this Commission.

Illustrative is the statement of Senator Feinstein on the floor of the Senate as follows:

"As a former mayor, I know how important it is to protect the city's bridges, roads and other public rights-of-way. I know the local government officials remain concerned about the bill and the preemption provisions.

"While legislative adjustments addressed some of the concerns of State and local governments, cities, counties and States remain concerned about the future and the possibility they could be brought to Washington before the Federal Communications Commission to defend local laws, regulations or fee.

. . .

"As for the issue of FCC preemption, while I favored the complete elimination of the preemption provision, I am pleased that the committee could accept the view that authorizes the Commission to preempt the enforcement only of State or local requirements that violate subsection (a) or (b), but not (c). The courts, not the Commission, will address disputes under section 253(c)." 142 Cong. Rec. S716 (daily ed. Feb. 1, 1996) (Statement of Sen. Feinstein.)

On the House side Congresswoman Pelosi said:

"As for the issue of FCC preemption, I am pleased that the committee agreed to support the Senate language which authorizes the Commission to preempt the enforcement only of State or local requirements that violate subsection (a) or (b), not (c). The courts, not the Commission, will address disputes under section 253(c).

The overwhelming vote in the House and Representative Barton and Representative Stupak's amendment, as well as the unanimous acceptance of Senator Gorton's amendment in the Senate, indicate that the Congress wishes to protect the legitimate authority of local governments to manage and receive compensation for use of the rights of way." 142 Cong. Rec. H1174 (Feb. 1, 1996) (Statement of Rep. Pelosi).

The preceding provisions were adopted by an overwhelming majority of the U.S. House in a floor vote -- specifically, a vote of 338 to 86. 141 Cong. Rec. H8477 (Aug. 4, 1995).

Thus (1) -- the clear language of the statute, (2) -- which was adopted specifically to prevent municipalities having to litigate right of way or compensation matters before this Commission, and (3) -- the adoption of this provision by overwhelming majorities of Congress mandate that the Commission issue no rules or guidance relating to right of way or compensation or related matters.

Although the preceding disposes of the majority of the comments by the cable interests noted above, MIT Communities note the following points.

B. Geographic Service Requirements:

In its discussion of the geographic service requirements, NCTA's comments suggest that cable operators serve entire communities.⁴ This statement is incorrect.

⁴ "Cable operators or affiliates utilizing cable system networks to provide telecommunications services pose no cream-skimming threat, since cable operators are required to build out their cable system to provide service to the entire franchise service area." NCTA Comments at 70.

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In many, if not most communities, cable operators do not serve the entire "franchise area." Instead cable companies generally are franchised to serve an entire community but actually have lines in and serve only a portion of it. Common examples are the following:

- Cable operators typically do not provide service to the less densely populated areas unless a certain "dwelling unit per mile" figure is met. This is typically an issue in newer subdivisions and areas towards the outer portions of metropolitan areas.
- Cable companies generally do not serve commercial or industrial areas, claiming that there is no demand for their service, it is expensive to provide, or the like. For example, in several of their core metropolitan areas or industrial parks MIT Communities have no cable service.
- Cable companies still refuse to provide service to certain minority or low income areas. For example, MIT Communities are advised that in San Francisco TCI/Viacom refuses to provide service to certain minority, inner city areas.

In general, MIT Communities note that one of the most contentious issues in cable television is who and where service will be provided. The matters typically addressed are the three outlined above (developing areas, commercial/industrial areas and inner city areas) where the cable companies at best drag their feet (by insisting on very high dwelling per mile requirements) or in some cases absolutely refuse to provide service to the areas in question.

The best statistic addressing the preceding is the simple fact that cable service is simply unavailable to large portions of the nation's population. By contrast, phone service is available to essentially all residents of the United States.

C. Case by Case Proceeding Required:

Cox Communications requests that this Commission promulgate general rules circumscribing local government action under Section 253. See Comments of Cox Communications at 69 and following. This cannot occur.

The statute unequivocally requires proceedings on a case by case basis. This is mandated by the opening clauses of Section 253(d) which state that the Commission can only act if:

- "After notice and an opportunity for public comment"
- "The Commission determines"
- "That a state or local government has permitted or imposed" (past tense)
- A statute, etc. violating Section 253(a). Section 253(d), Telecommunications Act of 1996.

Congress's use of the past tense ("a local government has permitted"), the requirement of a Commission "determination" for which there is "notice and an opportunity for public comment" shows that case by case proceedings are required. This is appropriate because the determinations will likely be fact intensive and will depend upon a particular alleged restriction and its impact. These can vary substantially among this nation's 38,000 municipalities and the tens of thousands of current (and future likely) telecommunications providers. And (as is set forth in the next section) there can be major errors in the alleged "facts" presented to this Commission by a telecommunications provider, such that a contested case proceeding is necessary for there to be an accurate factual record upon which this Commission can render a decision.

The preceding discussion should aid the Commission in the future. And the Commission can issue no prescriptive rules under Section 253 at the present time because it has failed to comply

with the requirements of Section 253(d), that is giving the required "notice and opportunity for public comment" required by Section 352(d) and by applicable notice requirements of the Administrative Procedures Act of the Federal Constitution.

D. Example Unpersuasive:

The sole example described by two of the cable interests (TCI and Comcast) of alleged improper local government action is unpersuasive. And there are major inaccuracies in the purported "facts" TCI and Comcast described in their example.

First, at least since the time of Aristotle 2500 years ago, it has been a common aphorism that "one swallow does not make a summer."⁵ There are at least 38,000 local units of government in the United States. The Troy, Michigan example given, even if correct (which it isn't) and multiplied several times, simply is insufficient in number (or specificity) to warrant Commission action. And as noted above, the Commission may act under Section 253 only on a case by case basis after notice and an opportunity for public comment.

Second, the claimed "facts" set forth by Comcast and TCI are at best inaccurate and misleading.

For example:

- On information on belief through its subsidiary, TCG of Detroit (in which TCI holds a substantial interest), TCI in fact is providing telephone service in Troy, Michigan.
- TCI itself has not applied for or received approval from the Michigan Public Service Commission to provide telephone service anywhere in Michigan.

⁵Aristotle, Nicomachean Ethics, Book I, Chapter 7.

- The statements by TCI and by Comcast that the City of Troy affirmatively regulates telephone rates is incorrect. TCI's comments at page 20 state that "Troy would regulate the rates charged for telecommunications services" and although TCI quotes other ordinance provisions in its footnote 33 with specificity, TCI only cites to support its "rate regulation" statement "§ 7 [of the Troy City Code] (establishing rate regulation)" (preceding parenthesized clause in the original). And see Comcast's statement that the City of Troy is attempting to impose rate regulation on telephone providers. Comments of Comcast, page 15 at footnote 26.

In fact, the City of Troy ordinance in Section 8 (not Section 7) says something quite different: It says that telecommunications rates and charges "shall be subject to regulation by the City to the full extent authorized by Federal or State law. The City may from time to time elect not to regulate Grantee's rates and charges . . ." This is far from affirmative regulation of telephone rates. It would appear that the City is merely reserving whatever future rights it may have.

There are other errors in TCI's and Comcast's description of the situation in Troy, Michigan. The preceding are sufficient to show that the purported facts they have attempted to put before this Commission are inaccurate and misleading. They also show the necessity for this Commission proceeding on a case by case basis under Section 253 to prevent these kinds of inaccurate and misleading statements. And for the reasons set forth above -- these allegations relate to fees and rights of way where this Commission lacks jurisdiction -- there is no basis for this Commission to act with respect to such matters in this proceeding.

E. Title VI Issues:

A few cable interests attempt to get this Commission to rule that municipalities may not require a franchise or any other requirement from a cable operator for that cable operator to provide telephone services. See e.g. TCI Comments at 21; Cox Comments at 58.

Substantively, the cable interests do not accurately quote the statute. In particular, Section 621 states that a municipality may not impose any requirement "under this Title" that has the purpose or effect of prohibiting a cable operator from providing telecommunications service. Section 621, Telecommunications Act of 1996. It is the phrase just quoted which TCI specifically omitted from its comments to this Commission. See TCI Comments at page 21.

The phrase "under this Title" was specifically inserted by the Conference Committee in Section 621(b)(3)(A) and (B) at the request of municipalities (and over the opposition of cable companies) approximately two days before the 1996 Act was submitted to the U.S. House and Senate in February. The phrase "under this Title" means what it says -- Title VI, otherwise known as the Cable Act. Thus in substance the statutory sections simply clarify that a cable company is not required to obtain a cable franchise before it provides telephone service.

See, for example, the statement of Congressman Dingell shortly before the bill's adoption by the House, who (as usual) had been extremely active on it as follows:

"State and local governments retain their existing authority to impose fees on telecommunications providers, including cable companies that offer telecommunications services. Finally, and perhaps most important, Section 303 does not preclude a local government from lawfully managing local rights of way with respect to a cable company's telecommunications services. In short, Mr. Speaker, we have listened to our local officials, who have done a good job of helping us understand their concerns, and have crafted a bill that not only retains their current authorities but in many instances strengthen those." 142 Cong. Rec. H1156 (Feb. 1, 1996) (Statement of Rep. Dingell).

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Once again, the cable interests are simply attempting to relitigate before this Commission something they lost in the halls of Congress.

In addition, for the procedural reasons set forth above, this Commission cannot address the issue of Section 621 in this proceeding. This is because in part the comments of the cable interests relate to right of way and compensation matters over which the Commission has no jurisdiction. In addition, as described above, this Commission is required under Section 253(d) to proceed on a case by case basis after notice and an opportunity for public comment. This has not occurred.

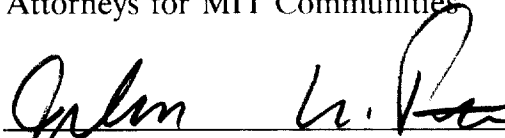
III. CONCLUSION:

For the reasons set forth above, MIT Communities respectfully request this Commission to reject the comments of the cable interests described above and their request for Commission rulings on matters pertaining to municipal franchising, rights of way, compensation or matters pertaining to Title VI and Section 621.

Respectfully submitted,

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